aging statements contained therein. The failure at the Board hearing to make known to respondent the contents of material documents was compounded by other administrative irregularities with respect to the compiling of the administrative record. Because of these material administrative irregularities, no finality can attach to the administrative decision of the Corps of Engineers Claims and Appeals Board. The Court of Claims has no jurisdiction to correct errors in a record by process of remand. If this Court does not affirm the judgment below, the proper forum to afford respondent an appropriate remedy is the Court of Claims on the basis of the evidence already presented to that Court.

ARGUMENT

I. THE WUNDERLICH ACT WAS INTENDED TO RESTORE THE STANDARDS EMPLOYED BY THE COURT OF CLAIMS BEFORE THE DECISION OF THIS COURT IN UNITED STATES V. WUNDERLICH IN DETERMINING THE FINALITY OF ADMINISTRATIVE DECISIONS AND WAS NOT INTENDED TO CHANGE ITS PROCEDURES FOR APPLYING SUCH STANDARDS

A. The Original Jurisdiction of the Court of Claims

The jurisdiction of the Court of Claims is founded upon the Tucker Act, 28 U.S.C. Section 1491(4) which provides that the Court of Claims shall have jurisdiction to render judgment "upon any claim against the United States * * * (4) founded upon any express or implied contract with the United States * * *." Suits under the Tucker Act involving contract claims against the United States are original proceedings in which the parties before the Court of Claims have always been accorded the opportunity to introduce competent evidence in open court.

It cannot be said that the Wunderlich Act is a jurisdictional statute. Had Congress intended to change the jurisdiction of the Court of Claims from jurisdiction over an original proceeding to a strictly appellate proceeding, Congress would have done so specifically. As hereinafter developed, neither the language of the Wunderlich Act nor its legislative history justifies the conclusion that the jurisdiction of the Court of Claims in contract suits has been altered in any way. All suits brought under the Tucker Act are in the nature of original proceedings based on evidence presented *de novo* in open Court. The Wunderlich Act is not even codified as a jurisdictional statute under Title 28 of the United States Code relating to the Judiciary and Judicial Procedure, where the Tucker Act appears, but instead is found in Title 41, U.S.C., Supp. IV, §§ 321 and 322, which title relates to Public Contracts.[2]

B. Court of Claims' Procedures in Reviewing Administrative Decisions Before the Wunderlich Act

Prior to the decision of this Court in the *United States* v. *Wunderlich*, 324 U.S. 98, the rule laid down by the Supreme Court in a number of cases was that the decisions of the head of the department were not final where they were arbitrary or capricious or so grossly erroneous as to imply bad faith. *Kihlberg* v. *United States*, 97 U.S. 398, 401, 402. *United States* v. *Gleason*, 175 U.S. 588, 602, 609. *Ripley* v. *United*

[2] As the concurring opinion in the *Volentine and Littleton* case observes, other bills offered to obtain relief from the *Wunderlich* decision would have constituted amendments to the Judicial Code, all of which were rejected, i.e. S. 2432, 82d Cong., 2d Sess.; H. R. 6274, 82d Cong., 2d Sess.; H. R. 6301, 82d Cong., 2d Sess.; H. R. 6338, 82d Cong., 2d Sess.; and H. R. 3634, 83d Cong., 1st Sess. Volentine and Littleton v. U. S., 136 C. Cl. 638, 648.

States, 223 U.S. 695. *Penner Installation Corp.* v. *United States*, 89 F. Supp. 545, 116 Ct. Cl. 550, affirmed *per curiam* by an equally divided court, 340 U.S. 898.

Appellant admits that prior to the Wunderlich decision no finality attached to the administrative decision, if it was capricious or so grossly erroneous as necessarily to imply bad faith or fraud, (Pet. for writ, Footnote 11 p. 10). These tests have been repeatedly applied in cases before the Court of Claims along with the additional requirement that the administrative decisions would not be upheld unless substantial evidence could be found for their support. In *Volentine and Littleton* v. *United States, supra*, p. 7, the Court of Claims stated that cases in which the departmental decision would not meet these tests "were held to be, by logical implication, not intended to be covered by the finality provision" (p. 641).

In determining whether the administrative decision under a disputes clause was arbitrary, capricious, grossly erroneous[3] or not supported by substantial evi-

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[3] Levering and Garrigues Co. v. United States, 71 C. Cls. 739, 757; Mittry, et al. v. United States, 73 C. Cls. 341, 362; Southern Shipyard Corp. v. United States, 76 C. Cls. 468, 480; Albina Marine Ironworks v. United States, 79 C. Cls. 714, 720; McShain v. United States, 83 C. Cls. 405, 409; Ambursen Dam Co. v. United States, 86 C. Cls. 478, 516, 523; H. B. Nelson Construction Co. v. United States, 87 C. Cls. 375, 380, 389; Baruch Corp. v. United States, 92 C. Cls. 571, 585; Hirsch v. United States, 94 C. Cls. 602, 631; Langevin v. United States, 100 C. Cls. 15, 39; DeArmas v. United States, 108 C. Cls. 426, 469; Meltzer v. United States, 111 C. Cls. 389, 486; Newhall-Herkner v. United States, 116 C. Cls. 419, 447; Great Lakes Co. v. United States, 116 C. Cls. 679, 684, 119 C. Cls. 504, cert. den. 342 U.S. 953; Penner Installation Co. v. United States, 116 C. Cls. 550, 563, 567, aff'd. 340 U.S. 898.

dence[4] the Court of Claims has always followed its established practice of permitting presentation of evidence *de novo* by both parties, not limiting the inquiry to the so-called administrative record. Likewise, in no case to come before this Court from the Court of Claims was error declared to exist for failure to restrict the inquiry to an administrative record.

There is no indication whatsoever in the decision of this Court in the *Wunderlich* case (342 U.S. 98, 100), that the Court of Claims had erred in basing its findings of fact upon evidence which was clearly outside of the administrative record. The decision of this Court is limited to the ruling that in the absence of fraud the decision of a department head stands.

Appellant states that even prior to the Wunderlich Act, it appears that the Court of Claims would not have considered evidence which the contractor did not present to the administrative decision-maker, citing *Needles* v. *U. S.*, 101 Ct. Cl. 535, 606-607. App's Br. p. 33. Quite the contrary, it appears from the decisions above cited (footnotes 3, 4 pp. 8, 9) that the Court of Claims always admitted the presentation of evidence *de novo*. Nor does the *Needles* case lend any support whatsoever to appellant's contention. The court there stated that gross error as that term is used in *Ripley* v.

[4] Ruff v. United States, 96 C. Cls. 148, 165 (1942); Bein v. United States, 101 C. Cls. 144, 166-167, 168 (1943); Myers Co. v. United States, 101 C. Cls. 41, 53 (1944); Loftis v. United States, 110 C. Cls. 551, 630 (1948); Asheville Contracting Co. v. United States, 1[illegible] C. Cls. 459, 500 (1948); Mitchell Canneries, Inc. v. United States, 111 C. Cls. 228, 247, 249 (1948); Wunderlich v. United States, 117 C. Cls. 192, 218 (1950); rev. 342 U.S. 98, 101; Russell H. Williams v. United States, 130 C. Cls. 435, 440 (1955), cert. den. 349 U.S. 938; General Casualty Company v. United States, 130 C. Cls. 520, 534 (1955), cert. den. 349 U.S. 938.

U. S., 222 U.S. 144, 147, justifies the court in upsetting the decision if the extent of the gross error and the character thereof are shown by proof of facts and circumstances known to or available to the contracting officer to have been inconsistent with good faith. The contracting officer was not the final decision-maker as indicated by appellant. All the facts in every case are known or available to the contracting officer though they may not be known or available to the head of the agency, the decision-maker.

The case of *Penner Installation Corp.* v. *U. S.*, 89 F. Supp. 454, 116 C. Cls. 550, affirmed per curiam by an equally divided court, 340 U.S. 898, is illustrative of the manner in which the Court of Claims applied the arbitrary or capricious and substantial evidence standards, permitting presentation of evidence *de novo*.[5] The case was decided after the decision of this court in *United States* v. *Moorman*, 338 U.S. 457 and before the Wunderlich decision. The court said at page 547:

> "So, when a case comes before us in which the Contracting Officer rules against the contractor, and there is no substantial basis in the contract to support his ruling, or no substantial evidence to support it, or when his decision is grossly erroneous, we can hardly conclude that he has acted impartially; we can hardly say that he has been faithful to his duty to render impartial decisions; or, to paraphrase the language of prior decisions, that he has acted in good faith."

In *Wagner Whirler and Derrick Corp.* v. *United States*, 128 Ct. Cl. 382, decided after the enactment of

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[5] A witness at the hearings before the Subcommittee on the Judiciary, United States Senate, 82d Cong., 2d Sess., on Finality Clauses in Government Contracts made reference to the views of the Court of Claims expressed in this decision, pp. 28, 29, 31.

the Wunderlich Act, the Court of Claims in applying the standards of the Wunderlich Act, said, quoting from *Needles* v. *United States*, 101 Ct. Cls. 535, 607.

> "* * * if this court is satisfied that no reasonable man could have determined the dispute upon all the relevant facts and data as the administrative officer did, then the Court is justified in inferring as a fact, that the decision was not made impartially or in good faith'." (p. 386)

C. The Legislative History of the Wunderlich Act Shows That Congress Had No Intention of Changing the Usual Procedures of the Court of Claims Permitting the Presentation of Evidence de Novo

This Court has stated: "the fair interpretation of a statute is often * * * revealed more by the demonstrable forces that produced it than by its precise phrasing". *Universal Camera Corp.* v. *National Labor Rel. Bd.*, 340 U.S. 474, 489.

The legislative history of the Wunderlich Act, indicating the forces that produced it, the remedial relief they were seeking and that which they understood they received, is set forth in detail in the Appendix, *infra*, pp. 1a to 17a. The Wunderlich decision was rendered on November 26, 1951. The Wunderlich Act was enacted on May 11, 1954 at the instigation of the contractors and their counsel, joined by the General Accounting Office.

Congress expressed the purpose of the Wunderlich Act as being "to overcome the effect of the Supreme Court decision in the case of the *United States* v. *Wunderlich* (342 U.S. 98)". H.R. Rep. 1380, 83d. Cong., 2d. Sess. p. 1.[6] It is most important for the purpose of

[6] The House Committee report comments: "'The Supreme Court was aware of the rigidity of the standard of judicial review therein prescribed and further stated: "If the standard of fraud that we adhere to is too limited, that is a matter for Congress."' H.R. Rep. 1380, 83d Cong., 2d Sess., p. 3.

this case to observe that in so doing Congress was attempting to *restore* the situation to what it had been prior to the Wunderlich decision, to restore to contractors all the rights they had before this decision, and that Congress had no intention of changing the usual procedures of the Court of Claims. This is confirmed by witnesses who appeared before the Congressional Committees.

The General Accounting Office took the position that the Wunderlich decision, by requiring proof of actual fraud, made it virtually impossible for that Office to fulfill its statutory duty of auditing and settling government accounts. Senate Hearings, 82d. Cong. 2d. Sess. on S. 2487, pp. 5, 6; App. *infra*, pp. 3a-5a. The view of the General Accounting Office was that that Office "and the Courts" had the right to determine the propriety of contract payments "on the basis of the facts and the law applicable thereto" and that no executive agency of the Government should have the authority to agree to a contract provision which would preclude the exercise of that right. A General Accounting Office representative testified with respect to the proposed bill "There would be restored to the courts and to the General Accounting Office the normal present jurisdiction or their normal proper jurisdiction". App. *infra*, pp. 3a, 4a. Appellant, in quoting this testimony, omitted reference to the significant words "normal present jurisdiction", making reference only to "their normal and proper jurisdiction". App.'s Br. pp. 52-53.

The position of members of industry seeking remedial relief from the Wunderlich decision is well illustrated by the testimony "In essence, our plea is that the Court of Claims or the United States Courts, *to the ex-*

tent which they now exercise jurisdiction, be authorized to grant relief in those cases in which the department board's decision is proved to have been unfair or unreasonable, or not supported by substantial evidence" [Emphasis added] App. *infra,* p. 10a.

Witness Gaskins, testified at the Senate hearings that he felt that the standards of review in the proposed bill "would substantially restore the rights the contractors had prior to the Wunderlich decision" and that the language of the bill "would adequately take care of the situation if the Committee wanted to return to the state-of-the-law situation that existed prior to the Wunderlich decision." App. *infra,* pp. 6a, 7a.

Mr. Gaskins was one of the attorneys for the contractor in the Wunderlich case. Appellant implies that Mr. Gaskins "made clear that only ordinary appellate review, not a *de novo* proceeding" allowing the presentation of additional evidence, would be permitted under the new bill. App's Br. pp. 31, 53, citing S. Hs. pp. 35, 36. H.Hs. pp. 79-80. This is a grave misinterpretation of the testimony of Mr. Gaskins. What is clear from his testimony is that it was his opinion that presentation of evidence *de novo* would be permitted under the Wunderlich Act as distinguished from a complete *de novo* review—a full trial on the merits—of the character allowed in Tax Court proceedings in renegotiation cases. Renegotiation Act of 1951, 50 U.S.C. App. 1218. Mr. Gaskins' expressed view was that he did not consider a review to be "*de novo*" if standards such as "arbitrary" or "capricious" were applied. Using the term in this sense, Mr. Gaskins stated that the pre-Wunderlich type of review was not *de novo.* Appellant's reference to the testimony of Mr. Gaskins (App's Br. p. 53, citing S. Hs. 35, 66) that the insertion

of the standards in the bill was "not in conformity with my recommendation that there should be a *de novo* review" quotes only one half of his sentence. Appellant omits any reference to the balance of Mr. Gaskins' sentence "but such language would, I think, adequately take care of the situation if the committee wanted to return to the state-of-the-law situation that existed prior to the Wunderlich decision and go no further." The omitted portion of the statement of Mr. Gaskins is essential to understand its full meaning. Since appellant places considerable reliance on the testimony of Mr. Gaskins, it is important to have the Gaskins testimony fully and accurately understood. See App., *infra*, pp. 7a, 8a.

Appellant cites the testimony of four witnesses, citing S. Hs. p. 82-84; H. Hs. pp. 57, 58, 61, 62. App's Br. pp. 53, 54. The testimony of these witnesses clearly indicates that they were making a distinction between a complete *de novo* hearing on the merits, analagous to *de novo* proceedings in the Tax Court in renegotiation cases, and a hearing by the Court of Claims in which only *de novo* evidence could be presented. App. *infra*, 9a, 10a. Appellant refers to one of these witnesses as having testified (pp. 57-58) in opposition to the proposal for *de novo* proceedings on the ground that such suggestions were getting "'beyond the purpose of the legislation that is before you * * * To attempt to go further might invite defeat' ". App's Br. p. 54. As a matter of fact this witness testified that "getting beyond the purpose of the legislation" was a "proceeding in the Court of Claims * * * without regard to the department's determination, analagous to *de novo* proceedings in the Tax Court in renegotiation cases." The hearing record shows that two paragraphs later the

witness said "I think, if Congress will help us get back to the position we were in in the Court of Claims prior to the Wunderlich decision, that is about all that reasonably can be expected. To attempt to go further might invite defeat" (App. *infra*, pp. 9a, 10a, S. Hs. pp. 57-58).

Another witness testified at the Senate hearings "As I understand it, the bills that are now being considered are designed to restore the status quo, that is, to bring back the situation that existed prior to the Wunderlich decision." App. *infra*, p. 11a.

Testifying at the House hearings with respect to the proposed bill of the Comptroller General, the language of which was incorporated in the Act, a witness stated that it was his belief that the proposed bill would restore to the Comptroller General and to the Courts *the respective status, rights and powers which they enjoyed* prior to the Wunderlich decision. [Emphasis added] App. *infra*. p. 11a.

Another witness at the House hearings stated that the bill will result in justice to all because of the freedom of access to the Courts. App., *infra*, p. 12a.

The Department of Defense took the position that legislation was not necessary because the same results could be accomplished by an amendment to the disputes clause in the contract. A letter from the General Counsel of the Office of Secretary of Defense to the Chairman of the Committee on the Judiciary of the House made reference to the fact that in decisions over a long period of time involving the disputes clauses, court action permitted "collateral attack", in cases in

which arbitrariness or capriciousness, fraud or gross mistake implying bad faith had been involved. App. p. 13a. The foregoing statement shows that the Department of Defense was aware of the usual Court of Claims' procedures; yet, without comment with respect thereto, this witness expresses approval of the Comptroller General's bill if the Committee should feel in its judgment legislation is necessary.

The Department of Defense emphasized the fact that representatives of the largest trade associations with whom they had to deal had stated they supported legislation in that form and it was important that they would be satisfied with the position taken by each other. App. *infra*, p. 14a. It is obvious that these trade associations would not have expressed such satisfaction had they anticipated that the proposed legislation could be interpreted as requiring a change in the usual procedures granted them in the Court of Claims.

The witness for the General Services Administration at the Senate hearings indicated the approval of his agency to the usual procedures employed in the Court of Claims. He felt that over the years they had furnished a reasonably satisfactory mode of settlement of these disputes. App. *infra*, pp. 14a, 15a.

The foregoing testimony before the Congressional Committees clearly indicates that the witnesses representing industry, the Department of Defense and General Services Administration construed the language of the Wunderlich Act as permitting the continuance of the usual procedures of the Court of Claims allowing the presentation of evidence *de novo*.

Congress was fully aware at the time it was considering the Wunderlich legislation that the Court of Claims, in reviewing an administrative decision under the disputes clause never confined itself to the administrative record. A spokesman for the Department of Justice, the principal objector to the proposed bill, expressed the view to the Senate Committee that the inclusion of the standards "arbitrary" and "capricious" would be an "open invitation" to the Court of Claims to continue to substitute its judgment for the head of the department. He stated, "we know from long experience that the Court of Claims would construe these terms to mean that it could substitute its judgment for that of the head of the department in any case it felt so inclined * * * it will constitute an open invitation to the Court of Claims to do what it has done * * * to substitute its judgment for that of the head of the department concerned in any case if felt so inclined." App. *infra*, pp. 15a, 16a.

In view of the long line of cases in which the Court of Claims had applied the standards of arbitrariness, capriciousness, gross error and lack of substantial evidence arrived at on the basis of evidence presented *de novo*,[7] it is obvious that what the spokesman from the Department of Justice was objecting to was the refusal of the Court of Claims to be bound by what had transpired in the so-called administrative proceeding.

There can be no clearer indication of the intention of Congress to permit the continuance of the procedures followed by the Court of Claims than Congress' enactment of the Wunderlich Act despite the strenuous objection of the Department of Justice.

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[7] See footnotes 3 and 4, *supra*, pp. 8, 9.

At no time before or after the consideration by Congress of the Wunderlich Act has a statute been enacted authorizing the use of a disputes clause in Government contracts, or prescribing the procedure to be followed in its application, or defining the administrative record to be assembled, these matters being left to the discretion of the department head. At the time the Wunderlich Act was being considered, Congress was advised that the disputes clause was not of statutory origin, and that its inclusion in the Government form of contract was not a matter of negotiation. App. *infra*, pp. 5a, 6a.

Congress understood it was restoring the standards of arbitrariness and capriciousness and that it was adopting the standard of substantial evidence. There is no indication in the House Report of the Committee on the Judiciary (H.R. Rep. 1380, 83d. Cong. 2d Sess.) that Congress desired to change the traditional manner in which the Court of Claims enforced these standards. The House Report, after stating that the purpose of the Wunderlich Act was to overcome the effect of the Supreme Court decision in the Wunderlich case quotes from the dissenting opinion of Mr. Justice Douglas and of Mr. Justice Reed in that case in part as follows:

> "* * * But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant, even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. The power granted is seldom neglected.
>
> The principle of checks and balances is a healthy one. An official who is accountable will act more

> prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinancy, irrational conduct and incompetency of an official. * * *"[8]

The Report also quotes from the dissenting opinion of Mr. Justice Jackson. It is quite apparent that the dissenting Justices and the House Committee envisioned the continuance of open hearings before the Court of Claims as well as a restoration of the standards of review of administrative decisions, as the only cure for the Wunderlich decision.

H. Rep. 1380 states at page 4:

> "A principal change which the amendment effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in Ripley v. United States (223 U.S. 695). * * *"

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[8] This same view was expressed by a witness at the House hearings, H. Hs. p. 13:

> "All of this points up the most important aspect of the corrective legislation—i.e., that the mere existence of an effective judicial review will insure fair and equitable administrative decisions. It is this policing effect which really interests the contractors. With it, they feel that they can enter into negotiations with the contracting officer on a more nearly even footing, and thus be able to arrive at a mutually satisfactory settlement of their problems. In general, as past history shows, the contractors are not interested in the trouble, expense and lost time involved in a court proceeding; their purposes are nearly always served if the contracting officer knows that they have the right to go to court."

"The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence. * * *"

A restoration of "the standards of review based on arbitrariness and capriciousness "' hich" have long been recognized as constituting a sufficient basis for judicial review of administrative decisions" necessarily embraces the continuance of the testimony in open court procedure heretofore consistently employed to apply the same standards.

The inference is clear that the additional substantial evidence standard heretofore applied on the basis of testimony taken in open court, is to be accorded the same treatment as the other standards. If there had been any intention on the part of Congress to treat the application of the substantial evidence standard in a manner different from any of the other standards of the Wunderlich law, such intention would have been made manifest in the law itself or at least in the Committee Report.

The Committee Report states, p. 6: "The Committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, with the exception of the standards of review therein prescribed." It is thus reasonable to assume that if the Committee had foreseen a possibility of the proposed legislation depriving a contractor of rights he had prior to its enactment the Committee would have so stated in its report.

House Report 1380, p. 5, indicates that the hearings brought to light the fact it was the exception rather than the rule that contractors, in presentation of their disputes, are afforded an opportunity to become ac-

quainted with the evidence in support of the Government's position. Mr. Gaskins, the witness on whom appellant places so much reliance, also testified to this effect.

Congress was informed that while some agencies operated efficiently, others had no procedure for the handling of appeals: Congress was also advised that instances existed where an agency would permit its Board to hear the Contractor's witnesses, after which the Government would produce no witnesses of its own, and the Board would then accept *ex parte* statements from the Government representatives whose decision had been the subject of the appeal, thereby depriving the contractor of the opportunity of cross examination. S. Hs. p. 35; H. Hs. pp. 12, 15, 16, 78, 79, 84, 85.

These same views are summarized in the opinion of the Court of Claims in *Volentine and Littleton* v. *United States*, 145 Fed. Supp. 952, 954; 136 Ct. Cls. 638. The Court of Claims there emphasized that "administrative records" in cases involving contract dispute clauses are "in many cases a mythical entity" without transcript or record; and there exists "no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents"; and that such Boards frequently upon their own initiative make independent inquiries without a contractor being present. The Court of Claims further stated that to gather together the pieces of a so-called "administrative record" would be a considerable task which, in many instances, would require the unthinkable procedure of putting the deciding officer on the stand to "ask him what he knew when he made his decision."

In the present case it took over a year to compile the Appeals Board record and in order to establish that material evidence not made known to respondent, was considered and relied on by the Board, the respondent was required to take the testimony of its attorney who had appeared before the Board, *infra*, pp. 39-44.

The lack of confidence members of the construction industry had in obtaining an impartial administrative agency hearing is illustrated by the following testimony of a law partner of Mr. Gaskins:

> "* * * I do not suppose that anyone would seriously urge that such Boards [referring to appeal boards] composed of employees of the contracting agency are an adequate substitute for an effective impartial review by the Courts. It would be just as fair and impartial as trying the appeal before a jury composed exclusively of employees of the contractor." H. Hs. p. 12.

The same witness, referring to a Board review of the decisions of the contracting officer, stated: "Can you imagine the Government trying an appeal before a board or before a jury which was composed entirely of employees of the contractor? Mr. Graham, it comes back to the old theory of judge, jury and executioner all in one place." H. Hs. p. 14.

The foregoing testimony is a clear indication that the representatives of industry would be satisfied with nothing less than pre-Wunderlich standards of review applied on the basis of the usual independent review of the facts made by the Court of Claims. If industry representatives were satisfied with the language of the bill as indicated by the Department of Defense, *supra*, p. 16, and by the House Committee Report, p. 7, it must have been because their expressed wishes were met by the legislation.

Appellant quotes the testimony of Mr. Gaskins relating to the better conduct of hearings, and improvement of procedures if the standard of substantial evidence is adopted. App's Br. p. 58, citing H. Hs. pp. 79-80. Appellant states "As Mr. Gaskins had suggested, the Committee stated that the substantial evidence requirement of the bill would make each party present its side of the controversy and afford an opportunity of rebuttal in the administrative hearings." The Committee report reads: p. 5.

> "* * * It is believed that if the standard of substantial evidence is adopted this condition [not affording contractors an opportunity to become acquainted with the evidence in support of the Government's position] will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions."

Respondent agrees with appellant that the foregoing language was inserted in the House Report because of Mr. Gaskins' suggestion embodied in the portion of his testimony quoted by appellant. App's Br. p. 58. However, his testimony and the Committee statement, above quoted, should be considered in the light of Mr. Gaskins' expressed view indicating that under the proposed bills there would be no change in the type of review afforded by the Court of Claims, *supra*, p. 13; App. *infra*, pp. 6a-8a. The testimony of Mr. Gaskins is particularly significant because of his many suggestions adopted by the Committee Report.

As indicated by the testimony of Mr. Gaskins, the portion of the Committee Report above quoted is consistent with the view that there is to be an open hearing in the reviewing court to test the Board's decision

against the standard of substantial evidence, as well as against the standards of arbitrariness, caprice or fraud. The additional standard of substantial evidence cannot be considered a limitation on the review by the Court of Claims. The Committee was concerned with the inadequate hearings before the administrative Boards and the incomplete administrative records there compiled. The additional standard of substantial evidence places the administrative Boards on notice that their decisions should be more carefully reached and should be based upon the evidence before them as shown by the record. See *supra*, pp. 18, 19.

The House Committee Report makes reference to the standards of review in the Administrative Procedure Act. The reference of the Committee to the Administrative Procedure Act standards is clarified by the testimony of Mr. Gaskins. Mr. Gaskins, in response to an inquiry from one of the Committee members whether there is merit in the argument that the substantial evidence rule might be a little broader than the jurisprudence before Wunderlich, responded, H. Hs. p. 80:

> "Representative Willis, there are some cases where the court has recognized the substantial evidence rule in connection with Government contracts. The substantial evidence rule has already received the stamp of approval of Congress by its inclusion in the Administrative Procedure Act. For that reason, it is nothing new. The meaning of the substantial evidence rule has been interpreted by hundreds of decisions which have been rendered under that act."

The Committee Report states that there is a wealth of judicial precedent behind the standards of arbitrari-

ness and capriciousness." Mr. Gaskins made reference to such judicial precedent in the following terms: H. Hs. 79.

> "The Court of Claims for many, many years, has consistently set aside those decisions, regardless of hearing procedures (referring to administrative agency hearing procedures), if it found that they were arbitrary or capricious or so grossly erroneous as necessarily to raise the implication of bad faith." [Parenthetical matter supplied]

The Committee Report (p. 4) states its understanding of the term "substantial evidence", citing *Consolidated Edison Company* v. *National Labor Relations Board* (305 U.S. 197, 229) as meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". This reference indicates that this meaning should be ascribed to "substantial evidence" as that term is used in the Wunderlich Act rather than a determination based on the weight of the evidence. The Committee references to the Administrative Procedure Act and to the terms "substantial evidence" and "arbitrariness and capriciousness" are not indicative of any intent on the part of Congress to change the established procedures of the Court of Claims in applying these standards.

The above review of the testimony of Mr. Gaskins indicates the extent to which the Committee relied on such testimony. The Committee Report should be considered in the light of such testimony and the witness's position, above indicated, that the language of the Wunderlich Act permits the Court of Claims to continue to apply the standards "arbitrary or capricious", and "substantial evidence" in the same

manner as it did before the Wunderlich decision, with no change in its procedures. The reliance of the House Committee on such material drawn from the testimony of Mr. Gaskins is striking evidence that they subscribed to his views that the Wunderlich Act did not contemplate any change in the traditional procedures employed by the Court of Claims for many years in applying the standards "arbitrary or capricious" or "not supported by substantial evidence."

Another clear indication that Congress intended that the Court of Claims should not be restricted to a review of the administrative record is the action of the Congress with respect to the claim of Martin Wunderlich Company that had been disallowed by this Court.

On September 4, 1957, Private Law 85-306, 85th Cong., H.R. 2654 "For the relief of Martin Wunderlich Company" was approved. Congress appropriated $111,539.59 to be paid to that company, representing the unpaid balance of the judgment on the claim in question (Claim No. 17), as granted by the Court of Claims. In the *Wunderlich* case, on the basis of testimony taken in open court, the Court of Claims had concluded that there was no substantial evidence to support the administrative decision, and that the same was arbitrary and capricious. *Martin Wunderlich, et al. v. United States*, 117 C. Cls. 92, 218-219. The legislative history behind Private Law 85-306 for the relief of Martin Wunderlich Company includes Senate Report No. 1153 of the Committee on the Judiciary, 85th Cong., 1st Sess., dated August 28, 1957, which at page 2 indicates that this Private Law was introduced to overcome the effect of the *Wunderlich* decision. The Report, referring to the Wunderlich Act, states:

> "* * * This law *restored the earlier standards of judicial review*, and permits the Court of Claims to set aside administrative decisions on the ground of fraud, including arbitrary or capricious action, and requires that administrative decisions must also be supported by substantial evidence" (Emphasis supplied).

In paying a judgment upon which evidence received by the Court of Claims in open Court had been used to set aside an administrative decision, Congress clearly indicated that the Wunderlich Act's restoration of the standards of judicial review embraced an open court hearing permitting the presentation of evidence *de novo*.

D. The Language of the Wunderlich Act Indicates No Intention on the Part of Congress to Alter the Procedure Employed by the Court of Claims Whereby It Reviews the Administrative Decision Based on Evidence Presented de novo

The presentation of evidence de novo before the Court of Claims is not inconsistent with the language of the Wunderlich Act. The Wunderlich Act provides standards by which the administrative decision is to be tested. The administrative decision is not to be accorded finalty if it is arbitrary, capricious or not supported by substantial evidence. There is nothing in the language of the act to suggest the procedure to be used by the reviewing court in applying these standards. The House Committee Report supports this view of the language of the Wunderlich Act, *supra*, pp. 23-26.

The Court of Claims, as in the present case, has provided appellate review based upon the standards specified in the Wunderlich Act. See also *Wagner Whirler & Derrick Corp.* v. *U. S.*, *supra*, pp. 10, 11. The Court

of Claims reviews the decision of the head of a Department or Board on the basis of the evidence presented de novo before it. But the decision of the Board is upheld if it is supported by substantial evidence. The Court of Claims does not seek to condemn the Board on the basis of evidence not before the Board as suggested by appellant. Rather it seeks to uphold the rights of contractors to fair adjudication of disputes and competent judicial review of government decisions consistent with the intention of the Wunderlich Act. This procedure is in every sense the appellate review based upon the specified standards of the Wunderlich Act.

The word "review" when used in statutes does not necessarily imply review in the strictly appellate sense. For example, section 108 of the Renegotiation Act of March 23, 1951, 65 Stat. 7, 21; 50 U.S.C. App. 1218, is entitled "Review by the Tax Court;" but the section itself provides for a redetermination of the very issues decided by the Renegotiation Board and not for a review of that Board's decision. See also the various ways in which the word "review" is used in the act of July 19, 1952, 66 Stat. 792, codifying the laws relating to the Patent Office.

"Arbitrary", "capricious" and "substantial evidence" are terms which have been used frequently and which have taken on meaning. But their meaning relates to the standards of review to be applied by the reviewing court and not to the procedure to be used in applying these standards. Review based upon these standards has often been limited to the administrative record as appellant states. But the situations cited b appellant all involved a statutory mandate that the

be an administrative record.[9] For example, in the Administrative Procedure Act, 5 U.S.C. Chap. 19, procedures were prescribed which the agencies were to follow in arriving at a decision (Sec. 1006). The right to subpoena witnesses and documents was granted (Sec. 1005 (c)), and provision was made for testimony under oath (Sec. 1006(b)). It was also provided that the usual rules of evidence were to be followed (Sec. 1006(c)). A formal administrative record was required to be prepared, containing both the oral testimony and such documents as were introduced in evidence (Sec. 1006 (d)). Section 9 of that Act authorized the Courts to set aside findings of fact where such findings were arbitrary, capricious, in abuse of discretion, or unsupported by substantial evidence "reviewed on the record of an agency hearing provided by statute" Sec. 1009(e)).[10]

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[9] Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. 901, 923 provides for open hearings, stenographically reported and the preparation of a record; Fair Labor Standards Act, 29 U.S.C. 201, 210, requires the Secretary of Labor to file a transcript of the record with the Court of Appeals; Federal Trade Commission Act, 15 U.S.C. 41, 45, requires the testimony at hearings to be put in writing and the record filed with the Court of Appeals; Indian Claims Commission Act, 25 U.S.C. 70, 70g, requires a full written record to be kept of all hearings and proceedings; National Labor Relations Act, 29 U.S.C. 160, requires that testimony be reduced to writing and that a transcript of the entire record be certified and filed with the Court of Appeals.

[10] In the 82d Congress, 2d Session, there was introduced H.R. 6404, that would have amended the Administrative Procedure Act to permit judicial review on appeal of decisions of department heads in disputes arising under Government contracts, which bill Congress saw fit to reject. This is another indication that the legislative history behind the Wunderlich Act reveals an unwillingness on the part of Congress to restrict the jurisdiction of the Court of Claims in contract cases.

Another example of the precision with which Congress acts in conferring strictly appellate jurisdiction is found in the Act of December 29, 1950, 64 Stat. 1129; 5 U.S.C. 1031-1042, inclusive. There Congress gave the Courts of Appeals the right to determine the validity of the orders of the Federal Communications Commission, the United States Maritime Commission and other agencies (Sec. 1032). The Act stipulated that such appeal "shall be heard * * * upon the record of the pleadings, evidence adduced, and proceedings before the agency where the agency in fact had held a hearing * * *" (Sec. 1037(a)). Section 1037, subsection (c) gave a party the right to seek leave of the appellate court to produce additional evidence if material, and if reasonable grounds existed for failure to produce such evidence before the agency.

If Congress desired to provide a similar type of appellate court review under the Wunderlich Act from decisions of the head of the department, it is clear from the foregoing that it knew how to do so. As stated in the concurring opinion in *Volentine and Littleton,* 145 F. Supp. 952, 957, 136 C. Cl. 638:

> "* * * Congress knew how to legislatively require the making of a record, affording the parties to the dispute administrative due process and also knew how to make the decision based on such a record reviewable on appeal. A reading of the Administrative Procedure Act and the Indian Claims Commission Act which do precisely that, indicates that it requires considerably more legislation than was indulged in in the Wunderlich Act."

Whether or not the standards for review are set forth in the statute, does not determine the question of upon what evidence that review is to be made. The cases

cited by appellant do not indicate that review should be confined to the administrative record in those cases involving decisions of executive agencies whose rights to exercise their authority are solely contractual, in the absence of specific legislation defining the limits of their authority and establishing appropriate safeguards to accord the other party, the contractor, at least a semblance of a fair hearing. These cases do indicate, however, that review is to be limited to the administrative record only in cases where there is required to be an administrative record or in those cases where the function of the reviewing court is strictly appellate.

All of the statutes cited by appellant which provide standards for review, require the making of an administrative record.[11] This Court in *Crowell* v. *Benson*, 285 U.S. 22, recognized the relevancy and importance of the nature of the proceeding before the administrative agency in determining the scope of judicial review to be afforded. That case arose under the Longshoremen's and Harbor Workers' Compensation Act. See footnote 9, *supra*, p. 29. This Court recognized the validity of the commissioner's final determination of facts so long as there was "due notice, proper opportunity to be heard, and the findings are based on evidence". "The statute, however, contemplates a public hearing and regulations are to require 'a record of the hearings and other proceedings before the deputy commissioner.'" p. 48. The opinion also recognizes that there are certain rights which are so basic, that the facts upon which a determination of those rights are based, called constitutional facts, must be determined by the court in order to provide the proper procedural safeguards. It is with a similar view

[11] See footnote , *supra*, p. 29.

to the relevance of the administrative procedures that the Court of Claims is vested with authority to heard evidence de novo, since there are no statutory procedural safeguards and there is no requirement that the head of the department or agency or Board compile a record of its proceedings.

The Packers and Stockyards Act, 7 U.S.C. 201, involved in *Tagg Bros.* v. *United States*, 280 U.S. 420 and *Acker* v. *United States*, 298 U.S. 426, although not specifically requiring the making of a record, does provide for a full hearing and for courts to restrain enforcement of orders of the Secretary of Agriculture in the same manner as in restraining orders of the Interstate Commerce Commission. The Interstate Commerce Commission is required to keep records and to have full public hearings. 49 U.S.C. 17. Judicial review to set aside orders of the Interstate Commerce Commission was founded on the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, 220, now 28 U.S.C. 2331, 2325, 2284. See *Louisville & N.C. Co.* v. *United States*, 245 U.S. 463.

The Communications Act of 1934, 48 Stat. 1093, involved in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, also incorporated by reference review under the Urgent Deficiencies Act. The Urgent Deficiencies Act of October 22, 1913 abolished the Commerce Court and vested its jurisdiction in the several District Courts. The Act provided that the procedure in the District Courts in respect to cases in which jurisdiction is conferred upon them by the Act shall be the same as those in the Commerce Court. The powers conferred on the District Courts are exercised by a three-judge court. The Commerce Court, with respect to the review of orders of the character in issue in the cited cases, had been granted

jurisdiction possessed by Circuit Courts of Appeal, (36 Stat. p. 1148, Sec. 207) which was the right to "exercise appellate jurisdiction" (36 Stat. 1133). Jurisdiction thus conferred of course precluded de novo review.

This Court has recognized the distinction between the jurisdiction, power of remand, and procedures used in reviewing administrative decisions of the Court of Claims and the District Courts in *United States* v. *Jones*, 336 U.S. 641. The opinion states (pp. 672-673):

> "Such review under the equity or declaratory jurisdiction of [the district] courts would seem to afford a remedy consonant with section 10 of the Administrative Procedure Act and also more nearly like that afforded by the Urgent Deficiencies Act, though without its expediting features. The relief afforded, unlike that required in the Court of Claims, could thus be limited to setting aside or enjoining the Commissioner's order and remanding the cause to it for further consideration, as is done in like cases reviewable by three-judge courts. Consistently with that jurisdiction also the review could be confined to the record made before the Commission *rather than one compiled by independent evidence not presented to the Commission or considered by it.*" [Emphasis added].

Congress has at times expressly provided for a *de novo* review in court following an administrative decision. But in each of the statutes cited by appellant the proceeding in the court was a full trial *de novo* on the merits and not just the presentation of evidence de novo. Under the Renegotiation Act of 1951, 50 U.S.C. App. 1218, a contractor aggrieved by an order of the Board determining the amount of excessive profit may petition the Tax Court for a "*redetermination*". The Tax Court is given the same powers and duties

as in cases of redetermination of an Internal Revenue deficiency. Section 1215 provides that a statement of facts which the Board is required to give to the contractor is not proof in the Tax Court.[12]

Under the Soil Bank Act, 7 U.S.C. 1801, 1831, the District Court is to determine in a trial de novo on the merits whether there has been a violation. See *United States* v. *Maxwell*, 278 F. 2d 206, 209, (CA-8). Under the Perishable Agricultural Commodities Act, 7 U.S.C. 499, the District Court is to hear the case *de novo*, the same as any suit for damages, except that the findings and order of the Secretary of Agriculture shall be prima facie evidence. However, this evidence can be upset by a preponderance of other evidence. See *A. E. Barker & Co., of Cal.* v. *Gilinsky Fruit Co.*, 100 F. 2d 863, 864 (CA-8) and *Angeles Brokerage Co.* v. *Carlo Panno Fruit Co.*, 211 F. 2d 341, 345, (CA-9).

This is not the procedure being followed by the Court of Claims. The Court of Claims is not hearing the case *de novo*, deciding the issues on the weight of the evidence, substituting its judgment for that of the administrative board. Rather the Court of Claims is hearing the evidence presented *de novo*, and then on the basis of the entire record made before it, it determines as an appellate court whether the Board's decision is arbitrary or capricious or whether there is substantial evidence to support the Board's decision, not whether it would have decided that way. This is not an unusual procedure.

In *Ma-King Products Co.* v. *Blair*, 271 U.S. 479, the issue was the right of the Commissioner of Internal Revenue to exercise his discretion under the

[12] It is significant that there is no requirement that the Renegotiation Board keep a record of its proceedings.

National Prohibition Act, Title 2, Section 1-39, in refusing an application for a permit to operate a plant for denaturing alcohol. The applicable statute provided that an applicant "may have a review of the decision by a court of equity", which may affirm, modify or reverse his findings "as the facts and law of the case may warrant". After the presentation of evidence *de novo*, the district court upheld the decision of the Commissioner. This Court stated that the provision that an adverse decision of the Commissioner might be reviewed in a court of equity "is to be construed, in the light of the well-established rule in analogous cases, as merely giving the court authority to determine whether, upon the facts and law, the action of the Commissioner is based upon an error of law, or is wholly unsupported by the evidence or is clearly arbitrary or capricious" p. 483. This Court held that there was no clear error which authorized it to set aside the Commissioner's findings.

The type of procedure employed by the Court of Claims is also common in state court review of licensing and zoning board decisions. The reviewing court tests the administrative decisions on the basis of standards similar to those in the Wunderlich Act, after hearing the presentation of evidence *de novo*. See Mass. G. L. c.40A s.21 and *Pendergast* v. *Board of Appeals of Barnstable*, 331 Mass. 555.

We submit that the language of the Wunderlich Act itself indicates no intention on the part of Congress to alter in any respect the original jurisdiction which the Court of Claims possesses over contract claims under the Tucker Act, or to change that jurisdiction to an appellate one in the sense of restricting that court's inquiry to the review of the so-called "ad-

ministrative record" upon which an administrative decision may have been based. Further, that the legislative history of the Act conclusively establishes that it was the intention of Congress to maintain the usual procedures of the Court of Claims permitting the presentation of evidence *de novo*.

E. To Limit the Court of Claims to Review of the Administrative Record Would Give the Contractor Only an Illusory Remedy and Assign to the Court an Impractical Role

Since there is no statutory authority authorizing or requiring a disputes clause in government contracts, nor any prescribed procedure for settling contract disputes, the matter of holding a hearing or making a record rests entirely in the discretion of the head of the administrative agency. The absence of procedural safeguards and the fact that the administrative record is often "a mythical entity" has been heretofore discussed, *supra*, p. 21.

Government Contract Boards, acting for the head of the department or agency, unlike usual administrative agencies, are directly involved as interested parties. It is unimaginable that they can be considered an adequate substitute for a fair, full and impartial review before the Court of Claims. See *supra*, p. 22.

While the Court of Claims may grant money judgments against the United States along with limited equitable relief, aside from its appellate powers under the Indian Claims Commission Act 60 Stat. 1054, 25 U.S.C. section 70(s) (1946), and the Federal Tort Claims Act 60 Stat. 842 (1946) (codified in scattered sections of Title 28 of the United States Code), it has no jurisdiction to correct errors in a record by process of remand. See *United States* v. *Jones*, 336 U.S. 641, 670 (1949), where the Court advanced as the major

reason for a restrictive view of the jurisdiction of the Court of Claims the inability of that court to render any judgment other than one for the payment of money. Thus, in considering an order of the Interstate Commerce Commission, the Court of Claims, if it found the order invalid, had no alternative but to proceed to a final decision of its own. This absence of power to remand should be contrasted with the power of the reviewing courts under many of the other statutes providing for review of administrative decisions[13] and of the Court of Claims under the Indian Claims Commission Act, 25 U.S.C. 70, 70(s). In those situations the court is granted power by statute to order the administrative agency to adduce additional evidence. If the Court of Claims were limited to the administrative record in the present case, the contractor would receive less protection for the adequate presentation of evidence than comparable persons aggrieved by decisions of other administrative agencies.

The procedure employed by the Court of Claims is the most practical of procedures. The appellant's position would require two court trials in many cases. The first trial would be confined to the presentation of the "administrative record" to determine whether, on the basis of what was in that record, the administrative decision was tolerable. If the Court decided that the departmental decision was not final, there would be a second trial on the merits, with all relevant evidence admissible, whether or not it was in the "administrative record". This would be necessary since there is no statutory authority for remand by the Court of

[13] Act of December 29, 1950, 5 U.S.C. 1031, 1037(c); Fair Labor Standards Act, 29 U.S.C. 201, 210; Federal Trade Commission Act, 15 U.S.C. 41, 45(c); National Labor Relations Act, 29 U.S.C. 160.

Claims. Under the present procedure there is only one trial on the basis of which the Court of Claims can decide whether the administrative decision is to be accorded finality and if not, what the correct decision should be.

Appellant suggests that the Court of Claims should stay its proceedings pending a new administrative determination, citing *Pennsylvania Railroad Co.* v. *United States*, 363 U.S. 202, 206 (Br. p. 39, 46). That case does not support any such proposition. The issue there involved was whether the Court of Claims should stay an action for the payment of freight charges pending the determination by the District Court of an appeal from an Interstate Commerce Commission order establishing certain rates as reasonable and applicable to the particular traffic in question. Exclusive jurisdiction vested in the District Court to make this determination and the stay was warranted. The case is in no way related to a review proceeding.

Even if the Court of Claims might stay its proceeding to afford the administrative agency the opportunity to hold a further hearing, the effort might be futile. There would be no assurance that such a hearing would be held, since the Court has no authority to require an administrative agency to have a further hearing and the agency may not even have established procedures for granting such hearing.

II. THE BOARD COMMITTED ADMINISTRATIVE IRREGULARITIES WARRANTING THE COURT OF CLAIMS TO RENDER ITS DECISION ON THE BASIS OF EVIDENCE PRESENTED DE NOVO

A. The Appeals Board Considered and Relied on Material Evidence Not Made Known to Respondent

The Corps of Engineers Claims and Appeals Board considered and relied on material documents not made known to respondent at the time of the hearing and not a part of the Board record.

The first paragraph of the decision of the Board refers to an appeal of Carlo Bianchi and Company, Inc. from the decision of the Contracting Officer denying its claim for additional compensation in the sum of $9,000.00. (R. 167). There is nothing in the record of the testimony taken before the Corps of Engineers Claims and Appeals Board bearing on the issue of the amount of damages, nor was there any reference to the amount of damages in the Board exhibits to which respondent had access at the time the Board record was first being assembled for presentation to the Court of Claims (R. 74-165). Not until six years after the hearing before the Board was the mystery cleared up. Counsel for the respondent obtained from counsel for appellant two intra-departmental documents mentioning for the first time a damage figure of "approximately $9,000." (R. 203, 204, 262). These two documents are: Court of Claims' Plaintiff's Exhibits Nos. 71 and 72 (R. 183-189). The Court found that the figure $9,000.00 had been mentioned nowhere except in said Exhibits (Fs. 45, 46, R. 262).

A hearing before a Commissioner of the Court of Claims was held in this case in Boston on September 28, 1956, before the decision of the Court in *Volentine and Littleton* v. *United States*, 145 F. Supp. 952, 136

C. Cl. 638. Respondent submitted a written motion to the Commissioner for leave to take the deposition of the attorney who appeared for respondent in the hearing before the Board to ascertain whether or not at the time of the hearing respondent had been apprised of the existence or contents of the documents, exhibits Nos. 71 and 72. The testimony of this witness was taken on written interrogatories. When handed respondent's exhibits Nos. 71 and 72 for examination, the witness testified that he had never seen either of these documents before. He also stated that the question of damages was never before the Board and the Government counsel so stipulated (R. 212-221). The witness further pointed out as stated by appellant that the Board's decision was rendered before the expiration of his allotted time to file his reply brief. (App's Br. p. 13).

The damaging statements contained in said exhibits which the Board considered and relied upon, and which respondent had no opportunity to refute before the Board, are hereinafter set forth. They are not by any means, as appellant states, confined to the erroneous figure of $9,000.00 (App's. Br. p. 45).

Exhibit No. 72 (R. 184) is a communication from the Acting District Engineer, dated February 10, 1948, transmitting to the Chief of Engineers, U. S. Army (the final appellate authority—R. 182) via the Division Engineer, North Atlantic Division at New York,[14] the

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[14] Exhibit No. 71 is a letter dated March 17, 1948 from the Division Engineer to the Chief of Engineers transmitting the material mentioned in Exhibit No. 72. The Division Engineer by endorsement to the material in exhibit 72 concurred in the recommendation of the District Engineer. His endorsement began "This appeal involving approximately $9,000 * * *".

Contracting Officer's Findings of Fact, the Contractor's Appeal, the Contractor's Comments *and his own comments covering six pages* containing a recommendation that the Contracting Officer's decision be upheld and that the claim for an extra payment be denied. (R. 184-189; Ct. Cls. Findings 45, 46 at R. 262) Following this recommendation, the Acting District Engineer (who was acting for the contracting officer) erroneously referred to the amount involved in the appeal before the Board as only $9,000.00. This was a trivial amount compared to the actual damages sustained by respondent, so that the Board could not have been aware of the seriousness of the case. This communication also stated that if this claim were paid it "would open the possibility for additional claims for overbreak and contingent items throughout the tunnel"; and this "is a continuing contract and funds have not been made available for payment of the instant claim" (R. 189). This alone indicates that respondent was denied its right to have its claim decided on its own merits, unshaped by ulterior motives looking toward the possible or probable consequences of the decision.

Exhibit 72 also contained damaging statements purportedly made by Mr. Worsell, the Assistant Supervisor of the New York State Division of Industrial Safety, Bureau of Mines, who had inspected the tunnel R. 186. Since respondent was unaware of these statements, it had no opportunity to challenge them before the Board. Having been apprised before the trial in the Court of Claims of the contents of exhibit 72, Mr. Worsell was called as a witness and testified on behalf of respondent. (R. 192-202) Had the contents of exhibit 72 been made known to respondent, Mr. Worsell would have been called before the Board to testify

as he did at the trial in the Court of Claims. This exhibit refers to the type of tunnel protection Mr. Worsell deemed necessary and recommended, having formulated his judgment by examination of the tunnel on April 24, 1947. The alleged statement implies that only temporary protection was necessary, whereas his testimony before the Court of Claims was that permanent tunnel protection was required. R. 195. The Board finding was that temporary protection would have sufficed (R. 176).

One of the main issues before the Appeals Board was whether or not the unforeseen subsurface conditions required the installation of permanent tunnel protection rather than temporary tunnel protection to safeguard the workmen which, during the course of excavation, was required to be done at the contractor's expense. (R. 80, 81.) At the Board Hearing, the Resident Engineer testified that there was no need for permanent tunnel protection (R. 159). The Government geologist also testified at the Board Hearing that only temporary protection was necessary and that permanent tunnel protection was not required (R. 138, 141).

Another damaging statement in exhibit 72 was the alleged remark of Mr. Worsell that it was unfortunate the contractor had not had the foresight to gunite the exposed tunnel roof with cement as the excavation progressed to seal it against air slacking (R. 186). Had respondent been apprised of this statement which indicates lack of diligence on the part of the contractor it would have established before the Board, as it did at the trial before the Court of Claims on cross examination of appellant's own witness, that guniting would have served no useful purpose. (Original Record, Tr. 1162, 1163, 1187.)

B. Another Administrative Irregularity Was the Board's Lack of an Adequate Record

Counsel for appellant spent over a year trying to assemble the exhibits before the Board; appellant's counsel was unable to ascertain what if any exhibits were missing: the Board did not retain all of the exhibits in its files; certain of the Board exhibits were unlettered as well as unnumbered; the Board never prepared and never had in its possession a list of its exhibits; appellant's counsel would not comply with the request of respondent's attorney to stipulate what exhibits were before the Board, and appellant's counsel took the position that the burden of establishing the exhibits before the Board rested upon respondent, objecting to the admission in evidence of documents that were not known to him to have been before the Board (R. 56-64; 203-205).

Because of the material administrative irregularities above described, no finality can attach to the administrative decision of the Corps of Engineers Claims and Appeals Board. In *Allied Paint and Color Works, Inc.* v. *United States* (decided August 29, 1962, U.S.C.A. 2d. Cir.), the decision mainly relied upon by appellant in its Petition for a Writ of Certiorari herein, 309 F. 2d. 133 (C.A.-2), appellant, in its brief for the United States, said: (pp. 32, 33)

> "* * * *any administrative irregularity affecting the administrative decision is a matter to be demonstrated in the reviewing court, and if found to be present, no finality would attach to the administrative decision.* For example, * * * *if the agency refused to permit the contractor to see the Government's evidence, under the standards of the Wunderlich Act the contractor would have a remedy* * * *"

The Court in adopting the Government's views recognized that a "full hearing" before the Board of Contract Appeals is a condition precedent to finality being attached to the Board's determination.

In the present case there were material administrative irregularities of the kind referred to in the above quotation. As stated therein, under these circumstances a contractor should have a remedy. If this Court does not affirm the judgment below, the appropriate forum for affording the respondent a remedy is the Court of Claims, (*supra* pp. 36-38) on the basis of the evidence already presented to that Court.

Appellant submits that by reason of the administrative irregularities committed by the Corps of Engineers Claims and Appeals Board, above mentioned, the application for a Writ of Certiorari in the present case was improvidently granted.

CONCLUSION

It is respectfully submitted that for the reasons stated, the judgment below should be affirmed.

WILLIAM H. MATTHEWS
Attorney for Respondent
821 15th Street, N. W.
Washington 5, D. C.

ROBERT F. BRADFORD
STANLEY KELLER
Of Counsel

March 1963.

APPENDIX

HISTORY OF THE WUNDERLICH ACT

The Legislative History

The decision in *United States* v. *Wunderlich*, 342 U.S. 98, was rendered on November 26, 1951. The Court there declared that if the standard of fraud adhered to is too limited, that is a matter for Congress. Government contractors importuned Congress to enact legislation to overcome the effect of the *Wunderlich* decision. During January 1952, four remedial bills were introduced in the House, two in the Senate. Appellant's Br. p. 51. S. 2487 is the first McCarran Bill. Hearings were held on this Bill before a sub-committee of the Senate Committee on the Judiciary in February and March, 1952. Many construction trade associations and representatives of private contractors made their views known.[1]

The McCarran Bill, S. 2487, as originally drafted, provided that no provision of any Government contract should be construed to limit judicial review to cases in which fraud is alleged, Appellant's Br. p. 51. As passed in the Senate, it made void any decision of an administrative official, representative or board, made pursuant to a disputes clause, which the General Accounting Office or a Court, having jurisdiction, found fraudulent, grossly erroneous, so mis-

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[1] Associated General Contractors, National Association of River and Harbor Contractors, the American Institute of Architects, American Road Builder's Association, National Association of Manufacturers, United States Chamber of Commerce, et al, and attorneys representing contractors. The General Accounting Office joined forces with industry. The Department of Defense and the General Services Administration participated in the hearings, but as hereinafter indicated, the Department of Justice was the only government agency to express the view there was no need for remedial relief in some form, whether by statute or by amendment of the disputes clause.

taken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence.[2]

S. 24, passed by the Senate at the next session of Congress, is identical with S. 2487, as are the reports of the Senate Judiciary Committee on these two bills. S. Repts. Nos. 1670, 32. Hearings were held on S. 24 and H.R. 1839, a similar bill, before a sub-committee of the House Committee on the Judiciary, in July 1953 and in January 1954.

Though Congress had failed in 1952 to pass any of the remedial bills, it afforded contractors some relief by tacking on a rider to the Defense Department Appropriations Act, Section 635.[3] The attitude of members of the House is indicated by the fact that in its original form, this rider would have flatly prohibited the use of the standard disputes clause in defense contracts.[4]

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[2] 82d Cong., 2d Sess., S. 2487 provided:

"That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative or board is alleged; and any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable probative, and substantial evidence.

Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative or board."

[3] 66 Stat. 537 (1952); re-enacted as Pub. L. No. 179, 83d Cong., 1st Sess., Section 635 (August 1, 1953).

[4] H.R. Rep. No. 1685, 82d Cong., 2d Sess. (1952), accompanying the 1953 Defense Department Appropriation Bill which passed the House, incorporated the original Section 635. As revised by the Senate and concurred in by the House, the prohibition against the use of the standard disputes clause was removed. 98 Cong. Rec. 9433, 9511 (1952).

In determining the meaning of language in the Wunderlich Act, and the intent of the Congress with respect thereto, respondent, like appellant, will make reference to the Senate hearings as well as those of the House. At the time amendments of the House to S. 24 were laid before the Senate, Senator McCarran made it clear that there was "nothing of a legislative nature" involved in the House Bill that was not involved in S. 24. This was in response to a question asked by Senator Thye.[5]

It follows that the testimony leading to the passage of S. 2487 and S. 24 should apply, with equal force to the enactment of H.R. 1839. The testimony given at the Senate and House hearings will be discussed by separate reference to the views expressed by the General Accounting Office, which was primarily responsible for the language of the Wunderlich Act, industry representatives, the Department of Defense, General Services and the Department of Justice.

Position of General Accounting Office

GAO expressed the belief that the *Wunderlich* decision would "not only deprive the General Accounting Office of effectively performing its statutory duty of auditing expenditures of Government funds and settling claims by and against the United States so far as contract matters are concerned but also oust the courts of their jurisdiction under the Tucker Act." Letter from Lindsay C. Warren, Comptroller General, S. Hs. p. 6.

The letter of the GAO further expressed the view that "no executive agency of the Government should have the

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[5] 100 Cong. Rec. pp. 5717, 5718, April 29, 1954. Preceding the above, in presenting the House Bill, Senator McCarran stated: "The language of the House Bill, while quite different from the language approved in the Senate, is designed to accomplish the same purpose. It is my understanding that the Department of Justice takes the view that the House language will accomplish the same purpose as the Senate language."

authority to agree to a contract provision which would preclude the Comptroller General *and the Courts* from determining the propriety of contract payments *on the basis of the facts* and the law applicable thereto". [Emphasis added] S. Hs. p. 6. In lieu of S. 2487, GAO recommended a bill (S. Hs. p. 7[a]) couched in almost the same language as the Wunderlich Act; [quoted at page 52 of appellant's brief].

A GAO representative testified that with the proposed bill "There would be restored to the courts and to the General Accounting Office, the *normal present jurisdiction*, or their normal and proper jurisdiction". [Emphasis added] S. Hs. p. 11. Appellant, in quoting this testimony, omitted reference to the words "normal present jurisdiction", making reference only to "their normal and proper jurisdiction". App's Br. pp. 52-53.

This witness also stated:

> "Such a law not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, *in addition to resort to the courts*, a further administrative remedy before the General Accounting Office, * * *
>
> The contractors, in addition, would have restored to them *the avenue to the courts*, * * *" [Emphasis added]

The Comptroller General was successful in persuading the sub-committee of the Senate to modify the original Mc-

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[a] "No Government Contract shall contain a provision making final on a question of law the decision of an administrative official, representative or board. Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, representative or Board is fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence."

Carran Bill to restore to GAO its former authority to upset final administrative determinations, as evidenced by the terms of S. 2487 and S. 24, as passed by the Senate. See note 2, *supra*, p. 2a.

GAO also continued its persuasive tactics during the House hearings. Two representatives of that Office testified at these hearings and five letters from the Comptroller General were incorporated in the record. H. Hs. 36, pp. 36-42, 133-137, 140-144. There was considerable opposition to the inclusion of the General Accounting Office in S. 24 and its companion bill, H.R. 1839, on the ground that the General Accounting Office should not be given express authority by statute to review and overrule the determinations of administrative officials because this would be an indication that it was given broader power than it had before the Wunderlich decision. To meet these objections, after conferring with industry groups, the Comptroller General recommended a substitute draft of a bill which he indicated would accomplish the same purposes. This bill, with a minor change became the Wunderlich Act. H. Hs.; pp. 135-137; H. Rept. 1380, 83d Cong., 2d Sess.

Representatives of the General Accounting Office, E. L. Fischer, General Counsel of GAO and R. F. Keller, Assistant to the Comptroller General, testified with respect to the origin of the disputes clause as follows: (H. Hs. p. 39)

Mr. Walter. I would like to get around to that standard form. Where does the authority come from for article 15, the article with respect to disputes?

Mr. Fischer. There is no statutory authority for the article. It has just grown up from practice.

Mr. Walter. Just one of those bureaucratic Topsys.

* * *

Mr. Walter. * * * The contractor has no voice in what that article contains has he?

Mr. Keller. Well, he has a voice, but sometimes it cannot be heard very loudly. I have heard many of them protest.

Position of Industry, Attorneys for Contractors and for Others

Reference is first made to the testimony of Mr. Gaskins, a partner in the law firm of King and King, the attorneys for the contractor in the Wunderlich case, because his testimony is so heavily relied on by the House Judiciary Committee, and so misinterpreted by appellant, as hereinafter indicated. S. Hs. pp. 32-36, 65-70; H. Hs. 77-88; 106.

Appellant states that Mr. Gaskins made it clear that only ordinary appellate review, not a *de novo* proceeding, would be permitted under the Wunderlich Act. App's Br. pp. 31, 53, citing S. Hs. pp. 35, 66. H. Hs. pp. 79-80.

It is evident from the testimony hereinafter referred to, that Mr. Gaskins made clear that presentation of evidence *de novo* would be permitted under the Wunderlich Act as distinguished from a complete *de novo* review which would not be permissible. The testimony of this witness clearly shows that his reference to a *de novo* review meant a complete *de novo* review on the merits such as that allowed in Tax Court proceedings in renegotiation cases.

Mr. Gaskins was requested by the Chairman of the subcommittee of the Senate Committee on the Judiciary to comment with respect to the bill proposed by the Comptroller General, hereinabove quoted, which contained language similar to the Wunderlich Act. *supra* p. 4a, note 6. The witness stated that he felt that the standards of review in the proposed bill "*would substantially restore the rights the contractors had prior to the Wunderlich decision*" but would not "permit contractors to enter into a contract with the United States on an equal footing as far as the facts are concerned." He then drew a distinction between a court contest where factual issues are de-

termined by a mere preponderance of the evidence, an obvious reference to a complete *de novo* hearing, and a contest where a greater degree of proof in favor of a contractor is required to establish fraud, arbitrariness, capriciousness, or gross error. [Emphasis added S. Hs. p. 66.]

In his earlier statement, S. Hs., p. 33, cited by appellant (Apps. Br., p. 53) after urging that there should be a *de novo* trial as in Tax Court proceedings and renegotiation cases, Mr. Gaskins stated, obviously referring to a complete *de novo* review on the merits:

> "I believe that a de novo review should be had. I think it is fundamentally wrong that a person who is interested in a matter should be made a judge and a jury as to the propriety of his own act.
>
> * * *
>
> Mr. Gaskins. "The Chavez Bill, as I understand it, that is 2432, prescribes no standards of review. That is it does not say that the administrative decision will be set aside if it is arbitrary or capricious or was erroneous.
>
> "Therefore, it would seem to me that in its present form, possibly this bill would permit a de novo review of the decision of a contracting officer which I feel would be desirable."

Appellant's reference to the testimony of Mr. Gaskins (App's Br. p. 53, citing S. Hs. 35, 66) that the insertion of the standards in the bill was "not in conformity with my recommendation that there should be a *de novo* review" omits reference to the balance of his sentence "*but such language would, I think, adequately take care of the situation if the Committee wanted to return to the state-of-the-law situation that existed prior to the Wunderlich decision and go no further.*" Also, Mr. Gaskins' comments related solely to his own suggested amendment to S. 2487, which clearly permitted the Court of Claims to hear evidence

de novo but did not permit a full hearing on the merits. [Emphasis added]

Appellant's statement that in the House Hearings (H. Hs. p. 79) Mr. Gaskins made clear that the *de novo* proceedings would not be permitted under the new bill is equally misleading. Here again it is obvious that Mr. Gaskins was referring to a complete *de novo* proceeding distinguished from the presentation of evidence *de novo*. Here, Mr. Gaskins testified that since the disputes clause the Court of Claims has never granted what he deemed a *de novo* review, but that it always has had an appellate review because a contractor "cannot prevail unless he can show that the decision was arbitrary or capricious or so grossly erroneous as necessarily to imply bad faith."

Mr. Gaskins also states:

> "Such legislation as the Comptroller General suggests would restore the necessary policing effect which the Court of Claims had over administrative decisions prior to the rendition of the Wunderlich decision. * * * and would restore the forum into which it (industry) might take its legitimate dispute."

It is clear from this witness's testimony he contemplated that the bills under consideration would result in the same type of review that the Court of Claims had always granted. H. Hs. p. 79.

Appellant makes reference to another witness who supported what appellant erroneously deems Mr. Gaskins' approach regarding a *de novo* review, (citing S. Hs. p. 82-84) and makes reference to other representatives of Government contractors who testified in opposition to the proposal for *de novo* proceedings (citing S. Hs. pp. 57-58, 61-62). App's Br. pp. 53, 54. As hereinafter shown, the testimony of all of these witnesses clearly indicates that they were referring to a complete *de novo* hearing on the merits where

the proof required is a mere preponderance of the evidence, as distinguished from a limited *de novo* hearing which requires a greater degree of proof to establish capriciousness or arbitrariness on the part of an administrative official. No possible inference can be drawn from their testimony that it was their opinion that the presentation of evidence *de novo* would not be permitted under the Wunderlich Act. In fact, their testimony clearly indicates that they advocated and expected to receive the same relief under the Wunderlich Act they were able to obtain prior to the Wunderlich decision in the Court of Claims, and under the usual procedures.

The witness appellant refers to as supporting the approach of Mr. Gaskins (App's Br. p. 53) stated:

> "The appeal, to be *fair* and *full*, should include a *de novo* hearing, so that the contractor might suffer no *procedural* or substantive handicap because of the adverse departmental ruling." (Italics supplied.)

This witness indicated that he would like to have this kind of a review "if possible—by an impartial body such as the Court of Claims * * *". S. Hs. pp. 82-83.

Appellant refers to a witness as having testified at Senate Hearings, pp. 57-58, in opposition to the proposal for *de novo* proceedings on the ground that such suggestions were getting " 'beyond the purpose of the legislation that is before you * * * To attempt to go further might invite defeat' ". App's Br. p. 54. Appellant omitted the fact that this witness was referring to "a proceeding in the Court of Claims * * * without regard to the department's determination, analogous to *de novo* proceedings in the Tax Court in renegotiation cases." This witness made it clear that he advocated a review in the Court of Claims "under usual procedures". He also stated "*I think, if Congress will help us get back to the position we were in in the Court of Claims prior to the Wunderlich decision,*

that is about all that reasonably can be expected. To attempt to go further might invite defeat." [Emphasis supplied] S. Hs. p. 58.

The witness appellant refers to testifying at pages 61 and 62 of the Senate Hearings (App's Br. p. 54), proposed an act which would have completely nullified the disputes clause, which would obviously have permitted a complete *de novo* review on the merits as distinguished from the limited *de novo* review afforded by the Court of Claims. He said with respect to such proposal: "Such language, I think, would open the doors of the courts and keep them open to anyone who has a just grievance * * *" S. Hs. pp. 61, 62. No possible inference can be drawn from the testimony of this witness, as suggested by appellant, that he opposed a limited *de novo* review.

The following are pertinent extracts from and references to the testimony of industry witnesses, indicating that the effect of the proposed statute would be to restore to the courts the review power and procedures they had prior to the Wunderlich decision. Witness Gaskins' testimony to this effect is heretofore set forth. *supra*, pp. 6a, 7a.

Attorney for Industry:

"In essence, our plea is that the Court of Claims or the United States Courts, *to the extent to which they now exercise jurisdiction*, be authorized to grant relief in those cases in which the department board's decision is proved to have been unfair, or unreasonable, or not supported by substantial evidence." S. Hs. p. 82.

Attorney for Trade Association:

"It has become well established in the Court of Claims, which prior to the Wunderlich decision we thought was also recognized by the Supreme Court, that if the decisions of the contracting officer were arbitrary, capri-

cious, or grossly erroneous, they would be set aside and disregarded in an appropriate proceeding brought in the Court of Claims for judicial relief.

"In other words, as things then were, you could get a judicial review of the situation, if you felt, and could prove, that the action of the contracting officer was arbitrary, capricious, or grossly erroneous. It furnished a safety valve that was sometimes needed from administrative abuse." S. Hs. 56.

The witness also stated:

"As I understand it, the bills that are now being considered are designed to restore the status quo, that is, to bring back the situation that existed prior to the Wunderlich decision * * *". S. Hs. p. 57.

Representative of Trade Association.

This witness stated: "If legislation is enacted we favor a bill which would restore to the Comptroller General, to contractors, and to courts the respective status, rights and powers which they enjoyed prior to the Wunderlich decision, and we believe that the bill proposed in the Comptroller General's letter would accomplish such a restoration." H. Hs. 104.

Attorney for Wunderlich Company.

"This bill would restore to the courts an effective review of determinations made by contracting officers and I strongly urge that it be enacted." (Referring to S. 24) H. Hs. p. 12.

* * *

"All of this points up the most important aspect of the corrective legislation—i.e., that the mere existence of an effective judicial review will insure fair and equitable administrative decisions. It is this policing effect which really interests the contractors. With it,

they feel that they can enter into negotiations with the contracting officer on a more nearly even footing, and thus be able to arrive at a mutually satisfactory settlement of their problems. In general, as past history shows, the contractors are not interested in the trouble, expense and lost time involved in a court proceeding; their purposes are nearly always served if the contracting officer knows that they have the right to go to court." H. Hs. p. 13.

This same witness, referring to Appeal Boards review of decisions of the contracting officer, stated: "I do not suppose that anyone would seriously however urge that such boards, composed of employees of the contracting agency, are an adequate substitute for an effective, impartial review by the court. It would be just as fair and impartial as trying the appeal before a jury composed exclusively of employees of the contractor." H. Hs. p. 12.

Attorney, former General Counsel to Federal Works Agency.

"As we all know, we have three departments in our Government and we go to the courts to decide disputes, and this bill would throw wide the portals of the courts of justice to anyone, including the Government, which has a grievance * * *" H. Hs. p. 19.

"The bill S. 24, as passed by the Senate on June 8, and the Bill H.R. 1839, will result in justice to all concerned and because of the *freedom of* access *to the courts* will lessen the volume of disputes in Government contracts because they will make for more careful administrative decisions and lessen the number of arbitrary decisions." H. Hs. p. 20.

Position of Department of Defense and General Services Administration

Department of Defense

The Department of Defense took the position that the result sought to be reached by the proposed legislation could be accomplished by amendment to the disputes clause in the contracts and that legislation was not necessary. S. Hs. p. 91; H. Hs. p. 54, 55, 131. The Department was of the opinion that its proposed amendment to the disputes clause "would provide a scope of review broader than that which existed prior to the Wunderlich opinion." S. Hs. p. 91.

The Deputy General Counsel of the Department of Defense testified that if legislation is passed, the Department felt that the standards should be what was generally considered to be the law before the Wunderlich case, namely, finality unless the decision was fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith. H. Hs. p. 54.

A letter from the General Counsel of the Office of the Secretary of Defense to the Chairman of the Committee on the Judiciary of the House of Representatives, dated February 21, 1953, states:

> • • • "In decisions over a long period of time the courts have sustained this procedure (referring to the disputes clauses and appeals) and given to disputes clauses in Government contracts the extent of finality prescribed by their terms, *permitting collateral attack through court action* in cases in which fraud or gross mistake implying bad faith has been involved or the administrative decision was arbitrary or capricious. • • •" [Emphasis added] H. Hs. p. 131.

The foregoing statement is quoted as another indication that Congress was apprised of the usual procedures em-

ployed by the Court of Claims in reviewing administrative decisions.

The Assistant General Counsel of the Navy Department testified:

> "However, if this committee should feel in its judgment that legislation is necessary or desirable, the Department of Defense feels that legislation in the form proposed by the Comptroller General in his letter to the chairman of December 30, * * * would be workable and we would not object to it.
>
> We are impressed by the fact that, this morning, representatives of three of the very largest and most important trade associations, who themselves represent a very large and important segment of defense industry contractors with whom we deal, have stated that they would not object, or would support legislation in that form. And, since, after all, they are the people with whom we are placing these contracts, we feel it is quite important that there be a meeting of the minds, as it were, and that we all be, so far as possible, satisfied with the position taken by each other with respect to contract clauses. H. Hs. p. 123.

The language of the legislation proposed by the Comptroller General, to which the witness referred, is used in the Wunderlich Act.

General Services Administration.

The position of the General Service Administration was that though remedial legislation was not needed, they did not oppose it. S. Hs. 96-99.

The representative of the General Service Administration testified with respect to the 5 bills before the Senate, one of which provided for complete *de novo* review: (*supra*, p. 7a)

> "I believe that we would not favor legislation that would permit judicial review completely *de novo of all factual disputes.* We would feel that giving the decision of the contracting officer some degree of conclusiveness except in certain circumstances, would be preferable, in that it furnishes a reasonable satisfactory—*and has over the years furnished a reasonably satisfactory mode of settlement of these disputes*—," [Emphasis added] S. Hs. 99.

Appellant states that a representative of the General Services Administration objected to *de novo* proceedings during the Senate Hearings, citing p. 96-99, App's Br. p. 55. It is clear from the above testimony of the representative of the General Services Administration that he objected to a complete *de novo* hearing, a full trial on the merits, and not to the presentation of evidence *de novo.* The witness also endorses the usual procedures of the courts which, over the years, have furnished a reasonably satisfactory mode of settlement of disputes.

Position of the Department of Justice

The Department of Justice took the position that there was no need for legislation because the Wunderlich decision did not constitute a departure from prior decisions of this Court. S. Hs., pp. 15-18.

The Department of Justice was the principal objector to the inclusion in the Wunderlich Act of the standards "arbitrary" and "capricious". A spokesman for the Department expressed the view to the Committee that the use of such words would be "an open invitation" for the Court of Claims to continue to substitute its judgment for the head of the Department, his testimony reading:

> "We would, however, be vigorously opposed to the employment in such a declaration of such words as 'arbitrary' or 'capricious'.

> "Aside from the indefinite nature of the standard which would be so established, *we know from long experience that the Court of Claims would construe these terms to mean that it could substitute its judgment for that of the head of the department in any case it felt so inclined.*
>
> "If you use words like 'arbitrary' and 'capricious,' which are completely devoid of substantive meaning and are indefinite in nature, *it will constitute an open invitation to the Court of Claims to do what it has done,* despite the fact that the rule of law was otherwise; that is, to substitute its judgment for that of the head of the department concerned in any case it felt so inclined." [Emphasis added] S. Hs. p. 19.

Another ground advanced by the Department of Justice for its opposition to the proposed legislation was that its enactment "would constitute an open invitation to a flood of litigation". S. Hs. p. 16. Congress was fully apprised that no such result would ensue.

In the Department of the Army for the period 1942-1950, inclusive, there were 1,994 cases before the Appeals Board. Only 66 of these cases were taken to the Court of Claims, of which only 39 cases involved hearings on the merits which had been considered by the Appeals Board. Of these 39 cases, 17 were reversed. H. Hs. p. 54. For the 15 years preceding the Wunderlich decision, only 48 cases, involving the determination by an administrative officer authorized to make a final decision pursuant to the standard disputes clause or similar provision, were decided by the Court of Claims. Of these, in 32 cases the Court of Claims upheld the administrative determination; in 16 cases the Court set aside the determination. H. Hs. pp. 13, 14, 86.

Some of the grounds on which the administrative decisions were set aside were "grossly erroneous" or "arbitrary and capricious" or "had no substantial evidence to

support it" was "not supported by the findings made nor by substantial evidence" or "arbitrary and unreliable" or "arbitrary action". H. Hs. pp. 13, 14.

In testifying at the House hearings, when asked by a Committee member whether the Department of Justice agreed with the words "not supported by substantial evidence" in a bill proposed by the Comptroller General in his letter to the Chairman of the Committee on the Judiciary, dated December 30, 1953, H. Hs. 135-137, the representative of the Department replied:

> "Our position is that we do not want to comment on that language as it will affect future contracts because we do not regard ourselves as an expert in that field. We are simply attempting to reserve the Government's present contract rights." H. Hs. 50-52.

The House Committee reported a bill in all respects almost identical with the one proposed by the Comptroller General adopting the language of the Comptroller General in his letter of December 30, 1953 as to the terminology defining the standards of review. H. Rep. 1380. The House passed the bill without debate. 100 Cong. Rec. 5510-5511. The Senate without extended debate concurred in the House amendments, approving the bill. 100 Cong. Rec. 5717, 5718.